93-891

Supreme Court, U.S.
FILED
DEC - 3 1993
OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LOCAL 18, INTERNATIONAL UNION
OF OPERATING ENGINEERS,
Petitioner,

v.

ERVIN SHIMMAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM FADEL
KATHLEEN M. SASALA
1340 Sumner Court
Cleveland, Ohio 44115

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Congress, in passing the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, intended to deny to unions—and to their members acting through the union's internal democratic processess—the right to publish newspapers that are subject to the editorial control of the union's duly elected leaders, and to require instead that union newspapers must be public fora, open to any member who wishes to express a dissenting view on any controversial internal union matter.

PARTIES

In addition to Local 18, the caption of this case in the United States Court of Appeals for the Sixth Circuit lists as a defendant-appellee Frank J. Miller. Mr. Miller—who had served as the Business Manager of Local 18 and the Editor of its newspaper—died on October 20, 1990. Accordingly, the district court dismissed Miller from the case and this dismissal was not appealed. App. 11a. The opinion below also includes in the caption International Union of Operating Engineers Local Numbers 18A, 18B, 18C, 18RA, and 18G, but these are mere subdivisions of Local 18 and have no legal status separate from that of Local 18.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THERE IS A CLEAR CONFLICT BETWEEN THE SIXTH CIRCUIT AND THE SECOND CIRCUIT ON AN IMPORTANT ISSUE OF LAW RELATING TO THE FREE PRESS RIGHTS OF UNIONS	8
II. THE DECISION BELOW IS CLEARLY WRONG; THE DECISION HAS NO SUPPORT IN THE STATUTORY LANGUAGE, STRUCTURE OR LEGISLATIVE MATERIALS, IS CONTRARY TO THIS COURT'S STATEMENT OF THE LMRDA'S OVERALL PURPOSES, AND RAISES SERIOUS CONSTITUTIONAL QUESTIONS REGARDING THE FIRST AMENDMENT RIGHTS OF FREE PRESS AND FREE ASSOCIATION	10
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Carothers v. Presser, 818 F.2d 926 (D.C. Cir. 1987) 14-15
Columbia Broadcasting v. Democratic Comm., 412 U.S. 94 (1973) 17
DeBartolo v. Florida Gulf Coast Building Trades Council, 485 U.S. 568 (1988) 19
Eu v. San Francisco Democratic Comm., 489 U.S. 214 (1989) 18
Finnegan v. Leu, 456 U.S. 431 (1982) 11, 14
General Motors v. United States, 496 U.S. 530 (1990) 12
Gozlon-Peretz v. United States, 498 U.S. 395 (1991) 12
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15, 16, 17
Masters, Mates & Pilots v. Brown, 498 U.S. 466 (1991) 13
Members for a Democratic Union v. Local 1011, CWA, 697 F. Supp. 771 (S.D.N.Y. 1987) 6
New York Times v. Sullivan, 376 U.S. 270 (1964) .. 16
Roman v. New York State Teachers, 655 F. Supp. 422 (S.D.N.Y. 1987) 6
Sheldon v. O'Callighan, 497 F.2d 1276 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974) 6, 8, 13
Steelworkers v. Sadlowski, 457 U.S. 102 (1982) 14
United States v. C.I.O., 335 U.S. 106 (1948) 18

STATUTORY & CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1254(1) 2
Labor Management and Reporting Disclosure Act of 1959
29 U.S.C. § 411(a)(2) ..... *passim*
29 U.S.C. § 412 3
29 U.S.C. § 481(c) 12
29 U.S.C. § 481(g) 12
U.S. Const., amend. I ..... *passim*

LEGISLATIVE HISTORY

NLRB, *Legislative History of the LMRDA* (1959) 11, 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. ————

LOCAL 18, INTERNATIONAL UNION
OF OPERATING ENGINEERS,
Petitioner,

v.

ERVIN SHIMMAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Local 18, International Union of Operating Engineers (hereinafter "Local 18"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *Shimman v. Miller, et al.*, 6th Cir. No. 92-3399 (June 14, 1993).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 995 F.2d 651 (1993), and is reprinted in the Appendix ("App.") to this Petition at 1a. The Decision and Order of the United States District Court for the Northern District of Ohio, which is unreported, is reprinted at App. 10a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 14, 1993. A timely petition for rehearing was denied by the Sixth Circuit on July 27, 1993. App. 16a.

On October 4, 1993, by order of Justice Stevens, the time for filing this Petition was extended to and including November 23, 1993. On November 15, 1993, by order of Justice Stevens, the time for filing this Petition was further extended to and including December 3, 1993.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(2), provides as follows:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 102 of the LMRDA, 29 U.S.C. § 412, provides as follows:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

The First Amendment to the United States Constitution provides in relevant part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

STATEMENT OF THE CASE

1. On February 29, 1984, the United States Senate Committee on Labor and Human Resources held a hearing—convened by its Chairman, Senator Orrin Hatch—on allegations of various unlawful activities by construction trades unions. Respondent Shimman, a member of Local 18, International Union of Operating Engineers, Respondent Shimman's attorney, and a second member of Local 18, were among the witnesses. Each testified that Local 18 had operated its hiring hall in a manner which discriminated against political opponents of the Union's leadership. Although Local 18's attorney, William Fadel, had requested the right to appear at the hearing to present Local 18's response to these allegations, and had made arrangements to appear, Mr. Fadel was told by Senator Hatch at the hearing that he would not be permitted to make any presentation, but could only submit a subsequent written statement.

2. Local 18 publishes a union newspaper, the *Buckeye Engineer*. Under the Union's Bylaws, the *Buckeye Engi-*

neer serves as "the Official Publication" of Local 18, to "be mailed to all members of the Local Union." The Union's Bylaws provide as well that Local 18's chief elected officer—the Business Manager—serves as the Editor of the *Buckeye Engineer,* subject to directions and policies laid down by the Union's elected executive board. J.A. 69 (Local 18 Bylaws, Article XXIX, § 2).

One feature in the *Buckeye Engineer* is a column, entitled "Report to the Members," by the Union's Business Manager. The April, 1984 column commented on the Senate Hearing just noted. The relevant text stated:

> Recently Local 18 received a letter from the Senate Committee on Labor and Human Resources asking Local 18 to appear and testify. Please understand, contrary to allegations, Local 18 is not under investigation. This Senate Committee was only taking testimony for proposed labor legislation.
>
> The notorious anti-union senator, right-wing Republican Orrin Hatch from Utah, conducted the hearings in absence of other committee members, with the exception of brief appearances by two fellow conservative Republicans. The hearings were neither fair nor impartial.
>
> Two members of Local 18 were permitted to testify as was a lawyer representing members suing Local 18. Although the committee was notified in advance, Local 18's lawyer was not permitted to testify or present documents which would have clearly shown that the allegations and accusations were false or misleading. Most of the events giving rise to the allegations made by the two Local 18 members occurred in the late 1960's and mid-1970's, all of which have been litigated in the courts and are still pending on appeal. [App. 11a-12a.]

In response to this column, Respondent Shimman submitted the following letter to the Union's Business Manager:

I appeared before the Senate Committee on Labor and Human Resources of which you in your "Report to the Members" in the April 1984 issue of the Buckeye Engineer called this a Anti-Union Senate hearing.

The truth is this hearing was held for the allegations of corruption in the I.U.O.E. of Louisiana Local 406 and Ohio Local 18.

Testimony was given not just of happenings in the past but right up to the present day.

Testimony was given as to the manipulation of the Referral by friends and relatives of Business Agents and Officers of Local 18. Local 18 continues to discriminate in favor of Business Agents and Officers' friends and relatives.

Officers and Agents continue to try to remove members off their jobs.

Business Manager Miller was invited to testify but declined.

Local 18 counsel William Fadel, was offered to present material to the Committee but never did.

Testimony was given as to the articles in the Buckeye Engineer being one-sided.

As you being the editor, I am asking you to print this article so I too can get the truth before all the members of Local 18.

Member of 38 years in Local 18. [App. 12a.]

The *Buckeye Engineer* did not publish Shimman's letter. In fact, the Union newspaper had never published letters submitted by members. Rather, the *Buckeye Engineer* was principally a means by which the Union's elected officers communicated with the Union's membership on issues that the leadership deemed important to the Union. App. 14a.

3. When the *Buckeye Engineer* declined to publish his letter, Shimman brought this action. Shimman claimed

that, by publishing in its official newspaper a column stating one side of a subject of controversy within the Union and refusing to publish his response, Local 18 had violated his right of free speech as a union member, as provided in § 101(a)(2) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2).

After a trial on a submitted record, the District Court for the Northern District of Ohio dismissed Shimman's claim. That court held that the *Buckeye Engineer* was not a "public forum," but a private newspaper published under the editorial direction of the elected officers of Local 18. Since the Union had never followed a policy of treating the newspaper as a "public forum," its refusal to publish Shimman's letter "does not constitute an unreasonable act of censorship in derogation of plaintiff's rights under § 411(a)(2)". App. 15a. As the district court put it, "because the *Buckeye Engineer* has not been opened as a 'public forum,' what articles are published lies not within the judgment of [a] Court, but rather within the discretion of the Union's Business Manager." App. 15a.

In reaching this conclusion, the district court relied *inter alia* on the decision of the United States Court of Appeals for the Second Circuit in *Sheldon v. O'Callighan*, 497 F.2d 1276 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974), and on two distinct court decisions following this Second Circuit decision, *see Members for a Democratic Union v. Local 1011, CWA*, 697 F. Supp. 771 (S.D.N.Y. 1987); *Roman v. New York State Teachers*, 655 F. Supp. 422 (S.D.N.Y. 1987). App. 14a.

4. The United States Court of Appeals for the Sixth Circuit reversed the district court and held that LMRDA § 101(a)(2) requires Local 18 to publish Shimman's letter in its newspaper.

The Sixth Circuit, in essence, reasoned that, to effectuate the LMRDA's "free speech" provision, Local 18's

newspaper must be deemed an "open forum" for the dissemination of member views on issues of controversy. Accordingly, that court determined that the editors of Local 18's newspaper were barred from making any content based decisions not to publish materials on such an issue submitted by members in response to views expressed in the newspaper.

First, the Sixth Circuit noted that the union's membership is geographically dispersed and its mailing lists are not made generally available, and that the newspaper should therefore be regarded as "the exclusive means of communication for members wishing to present an alternate point of view to other union members." App. 7a.

Second, the court below focused on the fact that the *Buckeye Engineer* is financed from Local 18 funds, so that each union member could be considered a co-owner of the paper. App. 7a.

And third, that court surveyed the prior editorial policies and practices of the *Buckeye Engineer* and determined that "those in charge of the *Buckeye Engineer*"—*viz.*, the elected officers of Local 18—"use it as a platform for the opinions of individuals who support[] Local 18's incumbent management and its views." App. 8a.[1]

On these bases, the Sixth Circuit concluded that the elected editor of the *Buckeye Engineer,* and the elected executive board that supervises him, must "print plaintiff's letter" and "must comply in the future with their obligation to accommodate free discussion by members in the pages of [Local 18's] publication." App. 9a. According to the Sixth Circuit, the opposite result "would contra-

[1] This conclusion rested on the fact that the newspaper in the past had published (a) the Business Manager's column; (b) articles by the labor-supported Governor of Ohio, which presented a favorable view of the labor movement and its political allies; and (c) one anonymous column—published two years after the controversy here—which denounced attacks on the labor movement in general and on Local 18 in particular. App. 7a-8a.

vene the Act's overriding objective of promoting union democracy." App. 8a-9a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR CONFLICT BETWEEN THE SIXTH CIRCUIT AND THE SECOND CIRCUIT ON AN IMPORTANT ISSUE OF LAW RELATING TO THE FREE PRESS RIGHTS OF UNIONS

As a general matter, freedom of the press in this country embraces the right of the publishers of a periodical to exercise editorial control over the publication in order to determine the publication's purpose, its form and its contents. And, again as a general matter, freedom of association buttresses that right by safeguarding the right of private associations, through their own processes, to establish official publications, under the editorial control of elected or appointed editors, for the purpose of stating the views of the organization and its leadership, and of recommending those views to the membership.

There is a clear conflict between the Sixth Circuit and the Second Circuit as to whether Congress, in passing the LMRDA, intended to deny to unions—and to their members acting through the union's internal democratic processes—the right to publish newspapers that, like the newspapers of any other organization, are subject to the editorial control of the union's duly elected leaders, and to require instead that union newspapers must be public fora, open to any member who wishes to express a dissenting view on any "controversial" matter.

The Sixth Circuit in the decision below held that Congress did so intend. The Second Circuit, in *Sheldon v. O'Callighan, supra,* held precisely to the contrary.

Sheldon involved LMRDA claims by three members of the International Organization of Masters, Mates and Pilots who opposed suggested constitutional amendments that the union's leadership had referred to the member-

ship for a referendum vote. The plaintiffs, challenging the referendum procedures, alleged that because the international officers had discussed the proposed constitutional amendments in the union's newspaper in a manner that emphasized the amendments' advantages—and minimized their disadvantages—the LMRDA required publication in the union newspaper of a statement submitted by plaintiffs explaining their objections to the amendments.

In rejecting this claim, the Second Circuit began from the proposition that in the LMRDA "Congress sought to strike a balance between rights for individual members and the recognized institutional requirements necessary for a union to be an effective bargaining force." 497 F.2d at 1281 (*quoting* Griffin, *The Landrum-Griffin Act*, 5 Ga. L. Rev. 622 (1971)). That court then recognized that a union and its members have every right to choose to operate a newspaper under the editorial control of a democratically elected leadership, so that the leadership may inform, advise, and persuade the membership with regard to important issues, and so that the leadership may be judged by the membership for their exercise of this responsibility. Accordingly, the Second Circuit concluded that a union is *not* obliged to operate a newspaper that provides each member an open forum for the expression of the membership's diverse views:

> The duly elected officers of a union have a right and a responsibility to lead, and to give the members the benefit of advice on questions that arise. They have a right to use the union publications to express their views, and are not ordinarily required to give space therein to the expression of contrary views, provided they do not interfere improperly with whatever rights members may have to communicate their views to other members. [497 F.2d at 1282.]

B. Put simply, under the decision below, the LMRDA makes it unlawful for duly authorized union leaders to

exercise normal editorial control of the union's official newspaper: *viz.*, to exercise the right to determine what to publish and what not to publish. In contrast, under *Sheldon,* the LMRDA leaves that basic editorial right intact. Thus, where the members so determine, normal editorial control can lawfully be exercised by those union officers that the union membership has democratically elected.

This conflict not only causes confusion in the administration of a basic federal statute covering tens of thousands of labor organizations and millions of their members, but has the consequence of placing publishers of national or international union periodicals in an impossible position. Any union that has members within, as well as outside of, the Sixth Circuit, and that distributes a periodical throughout the nation, may be subject to the broad repsonse rights stated in the decision below. Such a rule will inevitably chill the editorial freedom of the union press.

II. THE DECISION BELOW IS CLEARLY WRONG; THE DECISION HAS NO SUPPORT IN THE STATUTORY LANGUAGE, STRUCTURE OR LEGISLATIVE MATERIALS, IS CONTRARY TO THIS COURT'S STATEMENT OF THE LMRDA'S OVERALL PURPOSES, AND RAISES SERIOUS CONSTITUTIONAL QUESTIONS REGARDING THE FIRST AMENDMENT RIGHTS OF FREE PRESS AND FREE ASSOCIATION

By any fair assessment, both the holding and the reasoning of the Sixth Circuit are incorrect, and the contrary holding and reasoning of the Second Circuit are correct. Indeed, the Sixth Circuit's approach is doubly wrong; that approach is insupportable looking at this case as one of pure statutory interpretation and also raises the most serious constitutional questions.

A. The statutory language on which respondent's case rests is LMRDA § 101(a)(2)'s guarantee that "[e]very member of any labor organization shall have the right to meet and assemble freely with other members; and to ex-

press any views, arguments, or opinions . . . ." 29 U.S.C. § 411(a)(2). This statutory language is most naturally understood, in the words of this Court, as a guarantee of "the rights of union members to freedom of expression without fear of sanctions by the union." *Finnegan v. Leu*, 456 U.S. 431, 435 (1982).[2]

It is very much to the point that in this case respondent has suffered *no sanction of any kind* at the hands of his union.

In contrast, nothing in these words connote a congressional intention to impose on unions any general duty to facilitate—much less finance—any individual member's speech. These words certainly imply no intention to burden the freedom of union leaders to communicate with the union's members. And, as we now show, the overall structure of the LMRDA, as well as the legislative evolution of the statute, confirm that Congress had no such intentions.

First, LMRDA § 101(a)(2) contains language ensuring union members access to one and only one kind of union-provided forum of communication, the official union meeting. *See* 29 U.S.C. § 411(a)(2) (every member shall have right "to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's

---

[2] The principal sponsor of LMRDA § 101(a)(2), Senator McClellan, described this provision's meaning in much the same terms:

> That [provision] gives union members the right to assemble in groups, if they like, and to visit their neighbors and to discuss union affairs, and say what they think, or perhaps discuss what should be done to straighten out union affairs, or perhaps discuss the promotion of a union movement, or perhaps a policy in which they believe. They would be able to do all of that without being punished for doing it, as is actually happening today. [105 Cong. Rec. 5812 (daily ed. April 22, 1959), *reprinted in* 2 NLRB, *Legislative History of the LMRDA* 1104 (1959).]

established and reasonable rules pertaining to the conduct of meetings").

The fact that this one forum is singled out and opened to free membership participation, and that this is done through such specific statutory language, is powerful evidence that Congress had no intent to create a general right of access to all union-created methods of communications. *See Gozlon-Peretz v. United States,* 498 U.S. 395, 404-405 (1991); *General Motors v. United States,* 496 U.S. 530, 541 (1990).

Second, elsewhere in the LMRDA, Congress included a provision that requires unions to assist certain efforts of members to disseminate their views (as well as a provision that limits the ability of the union itself to participate in certain internal union debates), *but these provisions apply only in the specialized context of officer elections. See* 29 U.S.C. § 481(c) (requiring unions to distribute candidate mailings to membership at candidate's expense); *id.* § 481(g) (prohibiting use of union funds, including use of union-financed newspaper, to promote any particular candidate in officer elections).

Once again, the fact that the LMRDA does contain those specific access rules for the election context, but contains no access provision that would even arguably apply to the context of this case, is a strong indication that Congress did not intend to impose any such affirmative obligations (or any such disabilities) on unions in other contexts.[3]

Third, Congress in adopting these special guarantees regarding the election context specifically recognized that *outside the election context* the union leadership would, of

---

[3] Indeed, the fact that, even when an affirmative duty was contemplated, that duty was merely the duty to allow members to inspect membership lists—to facilitate communications by mail *at the member's expense*—shows that there was no sentiment in Congress to require a union to finance the dissemination of a member's views.

necessity, have unique access to the union's official means of communicating with the membership. But Congress viewed this attribute of leadership as one that requires a legislative check only in the election context. Congress did not seek to impose more general affirmative access obligations on unions (or more general disabilities on the union leadership). *See* 2 NLRB, Legislative History of the LMRDA 1241 (Sen. Javits) ("when a union has elected an officer, it has vested in him many responsibilities—funds, reputation, direction, and so forth, including [control of] the [union's mailing] list. My amendment [requiring unions to send out a candidate's mailings at the candidate's expense] seeks to equalize the situation *when it comes to election time.*" (emphasis added)); *see also Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 476 (1991) ("[t]he statutory guarantees [in the election context] are specifically designed to offset the inherent advantage over potential rank and file challenges possessed by incumbent union leadership . . . [including] the incumbents' control of 'the union newspaper which is the chief vehicle for communication with the members' ") (*quoting* Hearings on S.505, Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess. 134 (1959)).[4]

---

[4] It is true that in *Sheldon, supra*, the Second Circuit imposed an obligation on unions to fail literature to the membership at a member's request and expense in the context of a *referendum* election, even though 29 U.S.C. § 481(c) only imposes this obligation in the context of an *officer* election. But the Second Circuit limited its imposition of any such affirmative obligation to the election context—*viz.*, where the membership is directly exercising its franchise—and that court made clear that those seeking union assistance in distributing their message would have to pay the cost. As noted, the Second Circuit in *Sheldon*—unlike the Sixth Circuit below—rejected the concept that an individual member has any right of access to the union's publications or any right to impose on the union the costs of circulating the member's message. *See* 497 F.2d at 1281-83.

Fourth, the language of § 101(a)(2)'s "free speech" provision stands in sharp contrast with alternative "free speech" language before the 1959 Congress. In an earlier version of the "bill of rights" for union members, H.R. 4473 as introduced by Representative Barden, the free speech right was worded so as to place an affirmative obligation on unions to assist in members' efforts to disseminate their views. The provision declared as follows:

> Labor organizations shall guarantee to each member the right to express any views, arguments, or opinion and to disseminate the same, either orally or in printed, graphic, or visual form. In order to assist him in the exercise of such right, each member shall have the right to inspect a list containing the names and last known addresses of all members of the labor organization . . . . [H.R. 4473, 86th Cong. 1st Sess. 10 (*reprinted in* 1 NLRB, Legislative History of the LMRDA 175).]

That the final version of LMRDA § 101(a)(2) contains *no* such general affirmative duty of assistance—but only the far more limited access obligation regarding union meetings—is another confirmation of the conclusion that no such general duty was intended.

The statutory judgments that we have outlined are fully consistent with an overall policy of the LMRDA. As this Court has summarized it: "The Act's overriding objective was to ensure that unions would be democratically governed, and responsible to the will of the union membership as expressed in open, periodic elections," *Finnegan v. Leu*, 456 U.S. 431, 441 (1982). As long as this basic objective is obtained, it was Congress' judgment "that unions should be left free to 'operate their own affairs, as far as possible.'" *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982) (*quoting* S. Rep. No. 1684, 85th Cong., 2d Sess. 4-5 (1958)).[5]

---

[5] *See also Carothers v. Presser*, 818 F.2d 926 (D.C. Cir. 1987) (Edwards, J.):

In any case, it is not remotely inconsistent with the concept of democratic government—nor with any specific provisions of the Act—to leave to the union's membership, acting through elected officials who have been chosen pursuant to the Act's democratic procedures, the decision regarding what, if any, affirmative measures should be taken by the union to enhance the speech of individual union members. And, it is certainly not inconsistent with the concept of democratic government—nor with any specific provisions of the Act—to leave to the union's membership, acting through elected officials who have been chosen pursuant to the Act's democratic procedures, the decision regarding what kind of official periodical the union should publish.

B. The Sixth Circuit asserted that its decision implements general free speech principles and therefore advances the concept of union democracy. But, in fact, the opposite is true. The decision below is not firmly rooted in our system of free expression; to the contrary, that decision works a serious intrusion into the First Amendment's free press and free association principles.

1. "[C]ompulsion exerted by government on a newspaper to print that which it would not otherwise print . . . is unconstitutional." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). In *Tornillo*, this Court therefore struck down as unconstitutional a statute that imposed on the *Miami Herald* an obligation quite

---

[T]he "overriding objective" of the LMRDA is to ensure that unions will be "democratically governed." . . . However, in enacting the LMRDA, Congress did not leave courts without guidance in defining this concept of "democracy" in the union setting, for the statute sets forth certain *specific regulations* governing internal union affairs. In other words, "democracy" under the LMRDA is not merely a boundless ideal to be defined by the whim of any dissident voice; rather, the statutory notion of internal union democracy is precisely limited by the scope of the protections codified by Congress in the LMRDA. [*Id.* at 929 (internal citations omitted; emphasis in original).]

similar to that which the Sixth Circuit has imposed on Local 18's *Buckeye Engineer: viz.*, an obligation to print a reply to a previously published editorial on a subject of controversy. The Court did so because any such "[g]overnment-enforced right of access" to the press "exacts a penalty on the basis of the content of a newspaper." *Id.* at 256-257.

Put simply, the *Tornillo* Court held that the First Amendment protects against governmental "intrusion[s] into the function of editors." 418 U.S. at 258. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* And, the *Tornillo* Court held that the First Amendment's free speech and free press guarantees forbid "governmental regulation of this crucial process." *Id.*

In this regard, the Court reasoned that any imposition on a newspaper of an obligation to print certain material may cause the newspaper to forego printing other material, and that imposing an obligation to print replies regarding matters of controversy "might well" cause editors to "conclude that the safe course is to avoid controversy." 418 U.S. at 257. As a result, this Court concluded that any "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (*quoting New York Times v. Sullivan*, 376 U.S. 270, 279 (1964)).

The *Tornillo* Court added that any such "[g]overnment-enforced right of access" necessarily requires the state to decide such highly-subjective issues as whether a certain editorial state of affairs constitutes "fair" or "balanced" coverage of news and opinion, despite the fact that such state regulatory judgments are themselves in conflict with the First Amendment:

> [L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper A journal does not merely print observed facts the way a cow is photographed . . . . As soon as the facts are set in their context, you have selection, and editorial selection opens up the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection? [418 U.S. at 258 n.24 (*quoting* 2 Z. Chafee, *Government and Mass Communication* 633 (1947)).[6]

In this case, the Sixth Circuit construed the LMRDA to require a union newspaper, once it states one side of a controversy, to grant access to any union member wishing to advocate another side, especially where the newspaper has "consistently . . . promote[d] one point of view [*viz.*, that of the union's leadership] on internal union disputes." App. 8a. Given the holding and reasoning of *Tornillo*, such a construction of the LMRDA raises the most serious constitutional issues.

2. The Sixth Circuit rule at issue not only regulates the union press, it regulates union members in structuring their organization so as to enable their elected leaders to convey to the membership the leadership's views and concerns regarding public affairs. This raises a second equally serious constitutional problem:

---

[6] *See also Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94, 126 (1973) ("Under a . . . Government supervised right-of-access system . . . the Commission would be required to oversee far more of the day-to-day operations of broadcaster's conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of"); *id.* at 145-46 (Stewart, J.) ("Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.").

This Court has recognized that the First Amendment protects the right of an association to establish a newspaper through which the association's leaders may communicate with the membership on matters of associational concern. *See United States v. C.I.O.*, 335 U.S. 106, 121 (1948). As the *C.I.O.* Court stated, any construction of a statute that would burden an association's right to publish "periodicals advising their members . . . of danger[s] or advantage[s] to their interests," would present "the gravest doubt . . . as to its constitutionality." *Id.* And, in *C.I.O.* the Court rejected the proposition that the interests of individual dissenting members of an association such as a union can justify governmental restrictions on such publications. In the Court's words, "[m]embers of unions paying dues . . . know of the practice of their . . . organizations in regularly publishing periodicals. . . . It is unduly stretching language to say that the members . . . are unwilling participants in such normal organizational activities." *Id.*

Most recently, in *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989), this Court reaffirmed that association members have a First Amendment right to structure their association in a manner that grants the association's leaders the freedom to advise the membership on all issues of associational concern. *See id.* at 222-29 (association has right to designate its leaders and to empower that leadership to make endorsements to the membership). The First Amendment, in other words, protects the right of an association to determine its "standard bearer who best represents the [association's] ideologies and preferences," and protects the association's right to act through such a "standard bearer" in communicating with its members. *Id.* at 224. And, the *Eu* Court rejected the propriety of limiting the expressions of an association's leaders as a means of preventing undue leadership influence over the membership, since such a " 'highly paternalistic approach' limiting what people may

hear is generally suspect" under the First Amendment. *Id.* at 223-224 (*quoting Virginia State Bd. v. Virginia Citizens Council,* 425 U.S. 748, 770 (1976)).

The Sixth Circuit nonetheless proceeded on the premise that there is something illegitimate in an associational decision to delegate to its elected leadership full editorial control over its official publication. That premise cannot be squared with *C.I.O.* and *Eu.*

Against this constitutional background even if the Sixth Circuit's construction of LMRDA § 101(a)(2) had had some support in the traditional statutory materials—and as we have shown, it does not—that construction would still have to be rejected in favor of the Second Circuit's reading of the statute. *See DeBartolo v. Florida Gulf Coast Building Trades Council,* 485 U.S. 568, 586 (1988) (statutes should be construed to avoid serious constitutional issues in the absence of compelling contrary evidence.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

WILLIAM FADEL
KATHLEEN M. SASALA
1340 Sumner Court
Cleveland, Ohio 44115

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390